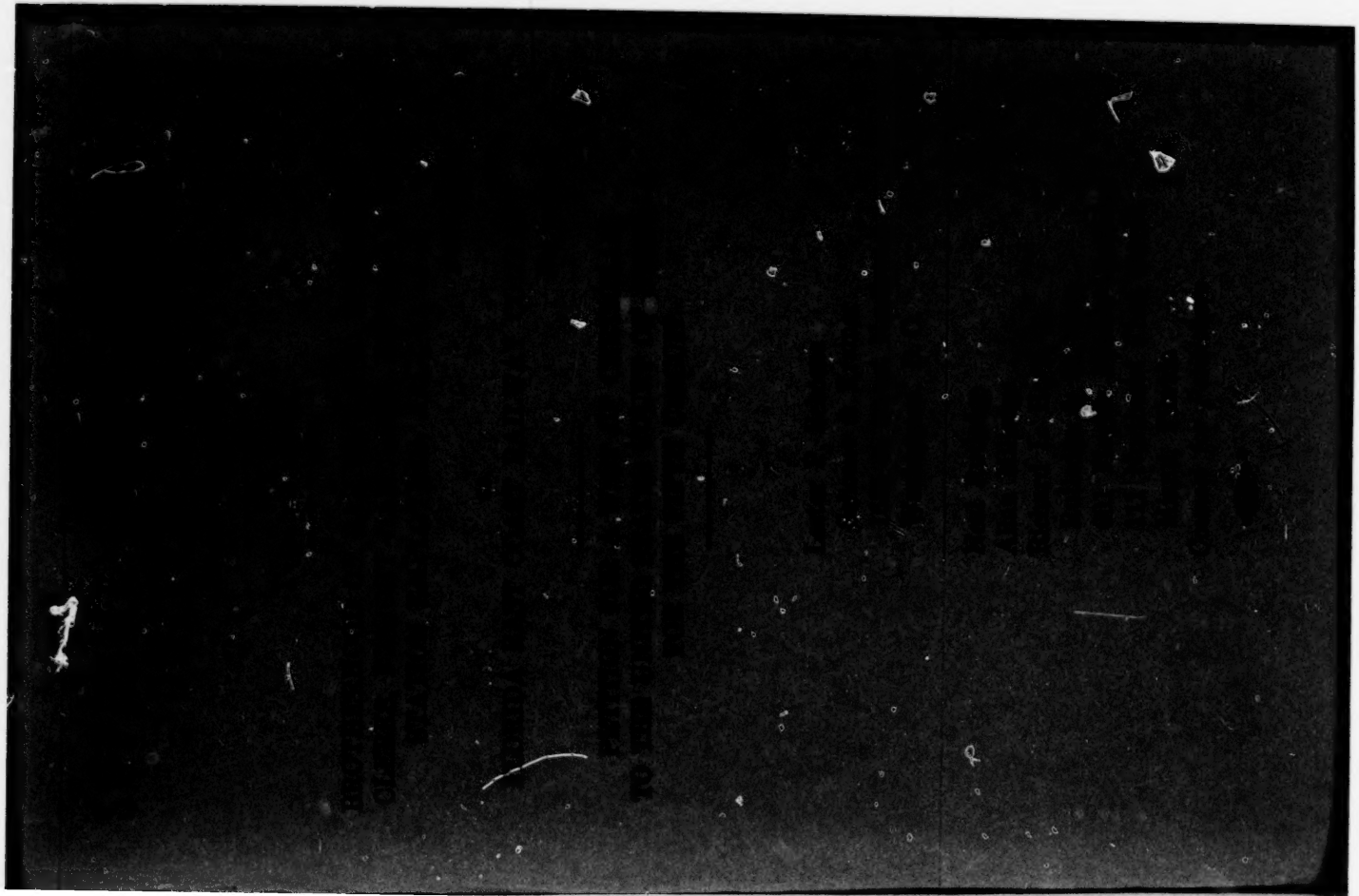

INDEX

TABLE OF AUTHORITIES

Cases:

Other Authorities:

TABLE OF AUTHORITIES (cont.)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. _____

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, et al.

Petitioners

vs.

FLORIDA EAST COAST RAILWAY COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Ap-

[1]Petitioners, who were intervenors in the District Court and appellees in the Court of Appeals, are:

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO; International Association of Machinists, AFL-CIO; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; Sheet Metal Workers' International Association, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Brotherhood of Railway Carmen of America, AFL-CIO; International Brotherhood of Firemen and Oilers, AFL-CIO; Brotherhood of Maintenance of Way Employees, AFL-CIO; The Order of Railroad Telegraphers, AFL-CIO; Brotherhood of Railroad Signalmen, AFL-CIO, and Hotel & Restaurant Employees & Bartenders' International Union, AFL-CIO.

peals for the Fifth Circuit entered in this cause on July 21, 1965.

Citation to Opinions Below

The opinion of the Court of Appeals dated July 21, 1965, is printed in Appendix A hereto, **infra**, and is reported at 348 F.2d 682 under the style of **Florida East Coast Railway Co. vs. United States.** The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed in the Record, Volume I at pp. 180-189, and the Preliminary Injunction which was appealed by respondent to the Court of Appeals appears in Volume I, pp. 189,191, of the Record. A certified copy of the Record plus nine copies of the Record as printed for use of the court below have previously been filed with this Court by the United States as petitioner in the companion case, **United States vs. Florida East Coast Railway Co.**, No. _____, October Term, 1965, arising out of this same litigation.

Jurisdiction

The judgment of the Court of Appeals was entered on July 21, 1965, and is printed in Appendix B hereto, **infra.** Mr. Justice Black, by Order dated October 15, 1965, extended the time to file a petition for writ of certiorari to and including November 18, 1965.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

---

[2]Upon application of the United States as petitioner, Mr. Justice Black on October 15, 1965, entered an Order Extending Time to File Petition For Writ of Certiorari to November 18, 1965. Thereafter the Florida East Coast Railway Co. applied on October 26, 1965, for "a modification of the extension of time previously granted so as to include all parties to the cause." This application was renewed on November 2; authorities were submitted in support thereof on November 5; and thereafter Mr. Justice Black endorsed on the application, "Motion granted if within my power to do so."

Questions Presented

1. May a Federal District Court aid a carrier faced with a legal strike, by relieving the carrier from its duty to comply fully with the Railway Labor Act in order to effectuate the carrier's "right to continue to run its railroad under the strike conditions"?

2. Did not the Court of Appeals rule in conflict with a decision of this Court, **Brotherhood of Railroad Trainmen vs. Toledo, P. & W. R.R.** (1944), 321 U.S. 50, by holding that affirmative federal equitable relief may be granted to a railroad involved in a legal strike even though the railroad has repeatedly rejected voluntary arbitration of the strike issues?

Statutes Involved

1. **The Railway Labor Act**, 45 U.S.C. 151-163. The applicable texts of Section 2, First (45 U.S.C. 152, First); Section 2, Seventh (45 U.S.C. 152, Seventh); Section 2, Tenth (45 U.S.C. 152, Tenth); Section 5, First (45 U.S.C. 155, First); Section 5, Third (e) (45 U.S.C. 155, Third (e)); Section 6 (45 U.S.C. 156); and Section 10 (45 U.S.C. 160) of the Railway Labor Act, being lengthy, are set forth in Appendix C hereto, **infra.** The provisions of Section 2, Seventh, and Section 6 are also set forth herein as follows:

Section 2, Seventh, Railway Labor Act, 45 U.S.C. 152, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6, Railway Labor Act, 45 U.S.C. 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Statement of The Case

This case involves the longest strike in the history of the American railroad industry. The dispute is a stubborn, bitter one which has resisted all efforts of the federal government (or anyone else) to resolve. Economic and other consequences on the State of Florida and on the lives of all persons affected are awesome, tragic, and incalculable. A brief history of the dispute is necessary to place the proceedings in the courts below in context.[3]

In September, 1961, petitioners, eleven railroad brotherhoods representing non-operating employees, served notices upon all Class I railroads, seeking an increase in wages and a provision for six months advance notice of layoffs. After collective bargaining and mediation proved unsuccessful, Presidential Emergency Board Number 145 was created in 1962, and a national agreement was arranged which was accepted by every Class I railroad except the Florida East Coast Railway Company.[4]

After further mediation between petitioners and the FEC proved unsuccessful, the National Mediation Board requested both parties to submit their differences to arbitration. Both the FEC and the petitioners refused this first request.

On January 23, 1963, the non-operating employees of the FEC began their legal strike. Picket lines were es-

---

[3]A more detailed history of the dispute may be found in the report of Emergency Board Number 157, dated December 23, 1963, which is contained in the printed record, Exhibit Volume I, pages 451-490.

[4]Hereinafter referred to as the FEC.

tablished which were honored by most of FEC's non-striking operating employees, and the FEC temporarily ceased operations. Eleven days after the strike began the FEC resumed operations. At first the FEC used only supervisory personnel. Gradually, however, it was able to recruit a work-force of replacements and returning employees.

On October 1, 1963, the FEC's then vice-president Thornton (now its president) testified before a joint Federal Inquiry Board that, "We have as of this time, in excess of 650 employees on the railroad whom we had recruited or who have actually returned to work since the work stoppage." He added, "I think we are approaching the point now where we are almost up to full manpower requirements." At that time FEC was handling approximately 95% of the car-load freight traffic handled in comparable pre-strike periods, but was still not accepting less-than-carload shipments or passenger traffic. (Record, Volume I, pp. 362, 364, 365, 387, 388)

The employees who returned to work, or who were recruited, were not employed, however, under rates of pay, rules, or working conditions as embodied in existing contracts. Instead, the replacements and the returning employees were required to agree individually to work on terms, unilaterally prescribed by the FEC, which differed radically from the existing contracts. These terms were codified by the FEC on September 1, 1963, in a document entitled "Conditions of Employment" for which each employee was required to sign a receipt and which were stated to apply for the duration of the strike. Suffice it to say that the "Conditions of Employment" reduced pay, increased hours, and radically favored the employer.

On September 24, 1963, the FEC embodied the "Conditions of Employment" in a Section 6 Notice which it served upon petitioners, and since that time the parties have engaged in "bargaining" as to whether the FEC should do what it had already done in fact since February 3, 1963.

Meanwhile, as the strike continued, Secretary of Labor Wirtz on April 3, 1963, and again on May 17, 1963, had requested that the parties agree to resolve their differences through arbitration. This time the striking unions agreed to arbitration but the FEC persisted in its refusal to arbitrate (Exh. Vol. I, 458-459). Again in October, 1963, the National Mediation Board proferred arbitration which the unions accepted but the FEC declined (Exh. Vol. I, 461).

This suit was filed on April 30, 1964, by the United States against the FEC seeking injunctive relief to enforce the provisions of Sections 2 and 6 of the Railway Labor Act. These union petitioners sought, and were granted, leave to intervene as additional plaintiffs. Hearings were held before the District Court on May 26, 27, and 28, 1964, but a decision was delayed pending the decision of the Court of Appeals for the Fifth Circuit in **Florida East Coast Railway Company vs. Brotherhood of Railroad Trainmen,** 336 F.2d 172. That decision was rendered on August 18, 1964, and thereafter an injunction was entered in this case on October 30, 1964. The injunction restrained the FEC from operating under the individual agreements entitled "Conditions of Employment" and required the FEC to abide by its duly negotiated agreements and further restrained the FEC from

"(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or *except upon specific authorization of this Court upon a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.*" (emphasis supplied) Record, Volume I, p. 190, 191.

On November 12, 1964, the FEC filed its application for approval of certain deviations from the duly negotiated collective bargaining agreements, which deviations it contended were "reasonably necessary" for it to continue to operate during the strike. After hearings, the District Court granted permission to the FEC to deviate from the duly negotiated collective bargaining agreements in certain enumerated respects (Record, Volume I, pp. 223-225).

Both the FEC and the United States appealed to the Court of Appeals for the Fifth Circuit. That Court rendered its opinion and judgment, here sought to be reviewed, on July 21, 1965. That decision affirmed the District Court and reiterated the doctrine, first created in **Florida East Coast Railway vs. Brotherhood of Railroad Trainmen,** 336 F.2d 172, certiorari denied, 379 U.S. 990,[5] that a district court may upon proper evidentiary showing, permit a carrier to deviate from Section 2, Seventh,

[5]In opposition to that petition for certiorari, FEC argued that no "reasonably necessary" exceptions had yet been granted to FEC in regard to petitioner BRT, and that the issue was therefore hypothetical or moot. Such is clearly not the case here.

of the Railway Labor Act (45 U.S.C. 152, Seventh) and unilaterally alter existing rules, rates of pay, and working conditions where reasonably necessary to aid the carrier to operate during a legal strike.

Argument and Reasons For Allowance Of The Writ

Petitioners rely upon the following reasons why the petition for writ of certiorari should be granted in this case:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Ever since the 1870's Congress has been vitally concerned with the matter of labor disputes in the Nation's railroad industry. Recognizing the dire consequences that the public as well as the parties suffer when labor-management relations break down in this key area of our economy, Congress has repeatedly struggled with the problem of providing a fair method of settling such disputes consistent with freedom and our traditions. Perhaps no other subject has come before the Congress so repeatedly and so persistently over so long a period. Public Law 88-108, approved August 28, 1963, is the latest example. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888. 25 Stat. 501. Between those dates, Congress applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; Title III of the Transportation Act of 1920, 41 Stat. 469; and

then the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238. Hardly a decade has elapsed without the need for Congressional attention. Clearly the problem itself is one of paramount national importance.

In this litigation, involving the longest strike in railroad history, the Court of Appeals for the Fifth Circuit has judicially created a major exception to the clear, plain, mandatory provisions of the Railway Labor Act. It has done this without reference to either the language of the statute itself or to its extensive legislative history so ably presented to it in the Government's brief. No other court of appeals, or state or lower court for that matter, has discovered this exception during the 39 years the Railway Labor Act has been on the books. Petitioners respectfully submit that review by this Court is essential in order to preserve the integrity of the Act and to insure that the Congressional purposes embodied in the Act are achieved. Even if it is determined that the exception so lately enunciated does in fact exist, review by this Court is necessary in order to define it more clearly and settle how it shall be uniformly administered by courts throughout the Nation.

The Court of Appeals held in this case that a railroad, when faced with strike conditions, may apply to a U. S. district court for leave to change rates of pay, rules, and working conditions of crafts, both striking and non-striking, despite the specific prohibitions of the Railway Labor Act which are enforceable by both civil and criminal sanctions. In short, the Court of Appeals held that the District Court is empowered to license a railroad to ignore

the statute where the railroad makes a sufficient showing that exemption from the Act is "reasonably necessary" for it to operate under strike conditions.

Apparently it is not just the U. S. District Court for the Middle District of Florida which enjoys this power to authorize exemption from the Railway Labor Act. District court judges throughout the country, as well as all judges of state courts of general jurisdiction, presumably may exercise their discretion from "the locomotive cab" (348 F.2d at p. 686) to decide whether it is reasonably necessary for the carrier to be relieved of its Railway Labor Act duties in order "to effectuate its right to continue to run its railroad under the strike conditions." (348 F.2d at 686.) It is neither idle nor speculative to suggest that the mere threat of strike action on any railroad system in the Nation will produce the greatest court-shopping expedition since **Swift vs. Tyson** (1842), 16 Pet. 1, 10 L.Ed. 865, was overruled. See **Erie R. Co. vs. Tompkins** (1938), 304 U.S. 64 at 74-75. Uniform judicial administration of the Railway Labor Act will become an impossibility. Courts will become active protagonists in railway labor disputes. If strike conditions become too onerous, there will always be a more palatable alternative to settling the strike — apply to the courts for exemption from the criminal and civil prohibitions of the Railway Labor Act. If successful, the strike then need never end, and the longer it lasts the more benefit accrues to the railroad.

The doctrine enunciated by the Court of Appeals may have even wider implications. If strike conditions warrant judicial exculpation from the burdens of the Railway Labor Act, why not also from those of the Federal Em-

ployers' Liability Act, 45 U.S.C. 51-60, the Safety Appliance Act, 45 U.S.C. 1-16, 15 U.S.C. 77c, 49 U.S.C. 26-27, and any other federal statute the suspension of which may be reasonably necessary to make a meaningful reality of the railroad's apparently inalienable right to operate under strike conditions?

In summary, petitioners suggest that the ruling of the Court of Appeals below is both novel and of tremendous significance to the stability of harmonious labor-management relations in the railroad industry. Even if confined to the boundaries of the Fifth Circuit alone, an area extending from El Paso to Key West, the effect upon the Nation's transportation systems and economy will be profound and, we respectfully submit, disastrous. This Court should review such a decision.

2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Unlike the National Labor Relations Act, 29 U.S.C. 141 et seq., the Railway Labor Act provides sharp "teeth" for violation of its prohibitions. Section 2, Tenth (45 U.S.C. 152, Tenth) of the Act provides as follows:

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, *seventh*, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than

> $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, *and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense.* * * *" (emphasis added)

Clearly Congress intended its mandatory procedures to be obeyed. Yet one of the very sections which Congress selected to enforce with criminal sanctions, Section 2, Seventh,[6] is the section which the Court of Appeals has ruled may be suspended, in whole or part, by judicial decree upon a showing by the railroad of reasonable necessity to break the law in order to continue operations under adverse economic circumstances.

Petitioners know of no other holding by this Court, by any court of appeals, or state appellate court that permits a person to apply to a court of law for permission to violate a criminal statute on the basis of economic necessity. Such a radical doctrine surely deserves review by this Court, if not by both this Court and Congress too. And if such a doctrine is to be developed, it is more than passing strange that the first applicant for relief should be a multi-million-dollar railroad owned and operated by the largest financial colossus in the State of Florida, the

---

[6]Section 2, Seventh, provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 [Section 6] of this title." 45 U.S.C. 152, Seventh. None of the existing agreements involved in this case permits changes in rates of pay, rules, or working conditions in any manner other than in compliance with the Railway Labor Act.

duPont Estate. What other criminal laws may likewise be suspended to make a "meaningful reality" of the railroad's right to operate? Is Labor equally free when the going gets tough to apply for exemption from criminal laws that impede its cherished right to strike so as to make such right more meaningful? The Court of Appeals left these questions unanswered, but its decision requires that they be answered lest hope of settlement of the current and future railway labor disputes completely vanish. This Court should review the decision rendered below that economic necessity may warrant judicial suspension of a criminal statute.

3. The Court of Appeals has rendered a decision in conflict with a decision of this Court.

In **Brotherhood of Railroad Trainmen vs. Toledo, P. & W.R.R.** (1944), 321 U.S. 50, this Court unanimously held that affirmative federal equitable relief in the form of an injunction against violence was not available to a railroad which had repeatedly rejected arbitration. By this refusal the carrier had failed in its duty to make "every reasonable effort" to settle the dispute, a duty made mandatory by Section 2, First, of the Railway Labor Act, 45 U.S.C. §152, and one which Section 8 of the Norris-LaGuardia Act expressly makes a condition to the granting of equitable relief in a case arising out of a labor dispute. This Court there stated (321 U.S. at 63):

> "Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court, or to put the matter more accurately, it fails to perfect the right to such relief. This is not compul-

sory arbitration. *It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court.*" (emphasis supplied)

The factual parallel between the case at bar and the *Toledo* case is remarkable. There, as here, both the striking unions and the railroad had initially rejected arbitration after exhaustion of the Railway Labor Act procedures. There, as here, the dispute arose out of differences between the parties as to rates of pay. There, as here, the dispute was "long-continued". There, as here, the unions changed their position in regard to arbitration and acceded to the Federal Government's requests for arbitration. There, as here, the railroad persisted in its refusal to accept arbitration. There, as here, the railroad breached its duty under Section 2, First, of the Railway Labor Act to make "every reasonable effort" to settle the dispute.[7]

There, the carrier's persistent refusal precluded federal equitable relief, even in the form of an injunction against violence. Here, however, the doctrine of "reason-

[7]The FEC's refusal to agree to voluntary arbitration is not the only way that it has failed to make "every reasonable effort" to settle the current dispute. Since the strike began in January, 1963, the FEC has been adjudicated to be in violation of either the Railway Labor Act (or Public Law 88-108, an amendment thereto) on six separate occasions by two different federal district courts. The FEC has been found to be in wilful contempt of injunctions requiring it to comply with the Railway Labor Act on three separate occasions, the latest being in September, 1965. And on May 28, 1965, in *Florida East Coast Railway Co. vs. Gamser et al.*, Case No. 65-155-Civil-J, U. S. District Court for the Middle District of Florida, the FEC's complaint seeking equitable relief against the National Mediation Board was dismissed on the basis that the FEC had failed to "approach the conference table in good faith" during mediation efforts of the National Mediation Board.

ably necessary" exceptions to the categorical prohibitions of the Railway Labor Act, created and promulgated by the Court of Appeals, permits the respondent to seek affirmative federal equitable relief of the most extraordinary sort.

Under this Court's holding in the *Toledo* case, such relief is not available. Certiorari should be granted to resolve this conflict between a decision of this Court and that of the Court of Appeals below.

Conclusion

Petitioners pray that this Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

Lester P. Schoene

Neal Rutledge

Allan Milledge

Richard L. Horn

Counsel for Petitioners

Schoene & Kramer
1625 K Street Northwest
Washington, D. C.

Rutledge & Milledge
601 Flagler Federal Bldg.
111 Northeast First Street
Miami, Florida

Of Counsel

Certificate of Service

I Hereby Certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 17 day of November, 1965, upon the following persons by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage prepaid:

Attorneys for the United States:

Honorable Thurgood Marshall
Solicitor General
United States Department of Justice
Washington, D. C. 20530

Honorable John W. Douglas
Assistant Attorney General
Civil Division
United States Department of Justice
Washington, D. C. 20530

Howard Shapiro, Esq.
Civil Division
United States Department of Justice
Washington, D. C. 20530

Walter Fleischer, Esq.
Civil Division
United States Department of Justice
Washington, D. C. 20530

William J. Hamilton, Jr., Esq.
Assistant U. S. Attorney
Main Post Office Building
Jacksonville, Florida

Attorneys for Florida East Coast Railway Co.:

William B. Devaney, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

George B. Mickum, III, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

J. Turner Butler, Esq.
814 Florida Title Building
Jacksonville, Florida 32202

Of Counsel for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22134

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA,
Appellee-Appellant,

(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida.

(July 21, 1965.)

Before TUTTLE, Chief Judge, EDGERTON,* and Smith,** Circuit Judges.

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal

---

* Senior Circuit Judge of the D. C. Circuit, sitting by designation.
** Of the Third Circuit, sitting by designation.

by the Railway from a preliminary injunction entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company v. Brotherhood of Railway Trainmen*, 5th Cir., 336 F.2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 nonoperating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F.2d 172, 182, which we here quote:

> " . . . The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism

for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonable necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the §6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the

"conditions of employment" of September 1, 1963 and from

> "making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

> (1) The use of existing personnel to do work across craft lines and seniority districts;
>
> (2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

(3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was

permitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain the suit. This distinguishes the case, the Railway says, from *Re Debs*, 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop.

The Railway further contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra.* See also *United States v. City of Jackson, Mississippi*, 5th Cir. 318 F.2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate commerce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of

proceeding by the United States. This provision is as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, . . . It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof . . ."

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra*, and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions,

nevertheless contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F.2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F.2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the existing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court . . ." The Railway contended that it should be permitted to institute the deviations and leave it to the

United States or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is, as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, Townsend v. Sain, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L.Ed.2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are

clearly erroneous as are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is AFFIRMED. On the cross-appeal of the United States, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1964

No. 22134

D. C. Docket No. 64-107-CIV-J

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant-Appellee,

versus

UNITED STATES OF AMERICA,
Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida

---

Before TUTTLE, Chief Judge, EDGERTON,* and SMITH,** Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

* Senior Circuit Judge of the D. C. Circuit sitting by designation.
** Of the Third Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the appeal by the Florida East Coast Railway Company and on the cross-appeal of the United States, in this cause be, and the same is hereby, affirmed.

July 21, 1965

Issued as Mandate: August 12, 1965.

APPENDIX C

RAILWAY LABOR ACT

45 U.S.C. 151 - 163

Section 2, First (45 U.S.C. 152, First):

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh (45 U.S.C. 152, Seventh):

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 2, Tenth (45 U.S.C. 152, Tenth):

> "Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a mis-

demeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Section 5, First (45 U.S.C. 155, First):

"First. The parties, or either party, to a dispute between an employee or group of employees

and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period

the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 5, Third (e) (45 U.S.C. 155, Third (e)):

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

Section 6 (45 U.S.C. 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of

an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Section 10 (45 U.S.C. 160):

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to in-

vestigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197."